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Supreme Court of the United States

OCTOBER TERM, 1946

No. 525

PETER CALDAROLA, (Plaintiff-Appellant in the Court below),

Petitioner,

—against—

MOORE-McCORMACK LINES, INC.,

Defendant,

—and—

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co., (Defendants-Respondents in the Court below),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

ABRAHAM M. FISCH,
ISIDOR ENSELMAN,
SIDNEY SCHIFFMAN,
Counsel for Petitioner,
Office & Post Office Address,
No. 225 Broadway,
New York 7, New York.

HIGGINS & HIGGINS, INC., LAW PRINTERS, 45 NEW CHAMBERS ST., N. Y.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Peter Caldarola, a resident of the State of New York, prays for a writ of certiorari to the

Court of Appeals of the State of New York to review its order entered on the 23rd day of July, 1946, a copy of which is annexed to the certified record submitted to this Court. The order of the Court of Appeals affirmed the order of the Appellate Division, which reversed the judgment in favor of the petitioner and against the respondents Gerda Eckert and Thor Eckert, Jr., partners doing business under the firm name of Thor Eckert & Co., and dismissed the petitioner's complaint, two of the Justices dissenting, upon questions of fact and law. (See folios 13 to 17 of the Supplemental Additional Papers to the Court of Appeals.) (Note:—Two additional records were submitted to the Court of Appeals, one entitled "Additional Papers to the Court of Appeals", and the other entitled, "Supplemental Additional Papers to the Court of Appeals". It became necessary to file the "Supplemental Additional Papers to the Court of Appeals" because the order of the Appellate Division which originally reversed the judgment of the petitioner and dismissed the complaint, was on questions of law only. This was amended to state that the judgment was reversed and the complaint dismissed on questions of law and fact.) A certified transcript of the record in this case, including the proceedings in the Court of Appeals is furnished herewith in accordance with Rule 38, Paragraph 1 of the rules of this Court.

Statement of the Matter Involved

This case involves the interpretation of the general agency agreement made between the War Shipping Administration and general agents concerning the operation of vessels during the war period. (See Agency Agreement, R. fols. 1009 to 1065, 1075 to 1089 and a book of Orders, Rules and Regulations of War Shipping Administration which are excerpts from Respondents' [Defend-

ants'] Exhibit No. 6, which Orders, Rules and Regulations, are in a separate bound volume.)

Petitioner, a longshoreman, was injured on the 27th day of January, 1944 while working on the deck of the steamship "Everagra", which vessel was owned by the United States of America (R. fols. 59, 141, 65). The accident occurred because a defective cargo boom broke, and which the jury held was defective (R. fol. 69). The petitioner was struck by the boom or by the tackle attached to it.

The cause of action against the respondents relied upon by the petitioner was that the boom which broke and injured him was rotten and defective and it was the duty of the respondents, as general agent, to keep the said boom in a good condition of repair. Petitioner proved that the boom had been in a defective condition for five to ten years prior to the happening of the accident (R. fols. 840, 841). The extent of the defect in the boom was testified to by witness John R. Russo (R. fols. 198, 199) and Vincent Russo (R. fols. 161 to 163).

Basis for Jurisdiction

The jurisdiction of this Court is invoked pursuant to Supreme Court Rule 38, Paragraph 5A. Another ground urged for jurisdiction is that the questions involved is of great public importance.

Questions Presented

1. Did the respondents, acting as general agent under the agency agreement with the United States Government, have a sufficient measure of control over the physical operation of the vessel?

2. Did the respondents, acting as general agent under the agency agreement with the United States Government, owe a duty to the petitioner, a longshoreman, to keep the ship's boom in a good condition of repair?

3. Is there any substantial difference between the agency agreement in the case at bar and the one considered by this Court in the case of *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575?

Opinion of the Courts Below

The case at bar was decided by the Court of Appeals on July 23, 1946 and reported in 295 New York 463. *Militano* v. *U. S. A., et al,* was decided by the Circuit Court of Appeals, 2nd Circuit on July 9, 1946 and is reported in 1946 A. M. C., p. 1143. The opinion of the Appellate Division in the case at bar in the court below is reported in 61 New York Supplement, 2nd Series, page 164 and decided on April 5, 1946.

Reasons Relied on for the Allowance of the Writ

The decision by the New York Court of Appeals in the case at bar has created confusion and is in direct conflict with the decision of *Hust* v. *Moore-McCormack Lines, Inc.*, decided by this Court on the 10th day of June, 1946 and reported in 1946 A. M. C., 727.

The decision of the New York Court of Appeals in the case at bar is also in direct conflict with the decision of the Federal Circuit Court of Appeals for the Second Circuit in the case of *Militano* v. *U. S. A., et al,* decided by the Circuit Court of Appeals on the 9th day of July, 1946 and reported in 1946 A. M. C. 1143.

Great confusion has resulted from the decision of

the New York Court of Appeals. In the State of New York, the Federal Circuit Court of Appeals has followed this Court's decision in the *Hust* case, while the State Court of Appeals has refused to do so. We thus have this unfortunate situation. A litigant in the Federal Court in New York State receives one brand of justice, while a litigant in the State Court with an identical cause of action has his complaint dismissed.

The New York Court of Appeals in the case at bar, *supra*, admitted that the agency agreement in the *Hust* case is identical with the agency agreement in the case at bar. In its opinion on page 466, the Court of Appeals stated:

> "The general agency contract made between the United States and defendant in the Hust case was identical with the contract of the present defendants with the government."

The New York Court of Appeals has held that under the agency agreement referred to, a third party who is injured on a vessel through a defect in the ship's equipment, has no cause of action against the agent. This Court in the cases of *Hust* v. *Moore-McCormack Lines, Inc.*, *supra* and *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575 and the Federal Circuit Court of Appeals in New York State in the case of *Militano* v. *U. S. A., et al*, *supra*, had held a contrary view.

The New York Court of Appeals, by its decision, erroneously held as follows:

1. That the respondents were appointed as agent to manage the business of the ship as distinguished from its physical operation.

2. That the respondents were not the operators

of the ship.

3. That the respondents were not in possession and control of the vessel.

4. That the respondents were not responsible to third persons for the condition of the vessel.

5. That the agency agreement in the case of *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575 differs materially from the agreement in the case at bar and for that reason, the New York Court of Appeals held the *Brady* decision has no application to the facts in this case.

Under the various points we propose to set out portions of the opinion of the New York Court of Appeals in the case at bar and then to quote portions of the prevailing and concurring opinion of this Court in the case of *Hust* v. *Moore-McCormack Lines, Inc.*, holding a contrary view. We also propose to set forth the opinion of the Federal Circuit Court of Appeals for the Second Circuit in the case of *Militano* v. *U. S. A., et al, supra*, which followed the reasoning of this Court in the cases of *Hust* v. *Moore-McCormack Lines, Inc.* and *Brady* v. *Roosevelt Steamship Co., supra*. The decision of the New York Court of Appeals is in direct conflict with the cases decided by this Court and the Circuit Court of Appeals in New York.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Court of Appeals of the State of New York requiring the said Court to certify and send up to this Court on a date to be designated a full and complete transcript of the record and of all proceedings in the Court of Appeals had in this action to the end that this action may be reviewed and determ-

ined by this Court; and the order of the Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper.

PETER CALDAROLA,

By ABRAHAM M. FISCH,
ISIDOR ENSELMAN,
SIDNEY SCHIFFMAN,
Counsel for Petitioner.

Dated: New York, New York,
October 10, 1946.

Supreme Court of the United States

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BRIEF IN SUPPORT OF THE PETITION.

POINT I

The decision of the New York Court of Appeals in the case at bar is contrary to the decision of this Court in the cases of Hust v. Moore-McCormack Lines, Inc. decided June 10, 1946 and Brady v. Roosevelt Steamship Co., 317 U. S. 575 and is also in conflict with the decision of the Federal Circuit Court of Appeals in New York in the case of Militano v. U. S. A., et al, decided July 9, 1946 and reported in 1946 A. M. C., p. 1143.

In the case at bar, the New York Court of Appeals,

in its decision which is reported in Volume 295, page 463, the Court by Desmond, *J.* stated:

> "Plaintiff, a longshoreman, was injured while working on the deck of a steamship moored at a New York City pier, by reason of the breaking of a defective cargo boom which is part of the ship's gear and which, the jury held was defective. Plaintiff was not a member of the ship's crew, but was an employee of an outside stevedoring contractor. The vessel was owned by the United States. Plaintiff sued defendants-respondents Eckert, alleging and attempting to prove that those defendants were so much in possession and control of the ship, at the time of the accident, as to make them responsible to third persons lawfully on board for injuries caused by unsafe conditions of the ship. The jury found for plaintiff but the Appellate Division reversed upon the facts and law and dismissed the complaint * * *
>
> That the defendants were not the operators of the ship or responsible to third persons for its condition * * *

Judge Desmond, on page 466, stated:

> "We are in full agreement with the Appellate Division's conclusions and the reasons therefor as stated in its opinion. There would be no occasion for writing this opinion were it not for plaintiff's reliance on the decision of the United States Supreme Court (handed down the day before the argument of the present case in our court) in *Hust* v. *Moore-McCormack Lines, Inc.*, ... U. S. ....). In that case the Supreme Court re-

versed a decision of the Supreme Court of Oregon which had dismissed the suit of plaintiff Hust, who, unlike the present plaintiff, was a seaman. The 'General Agency' contract made between the United States and defendant in the *Hust* case was identical with the contract of the present defendants with the government. But Hust's suit was brought under the 'Jones Act' (U. S. Code, Tit. 46, Sec. 685) which gives a seaman a statutory cause of action in negligence against his employer. The majority opinion in the Supreme Court holds only that the Jones Act should be liberally construed so as to give Hust a cause of action in negligence thereunder against the 'General Agent'. A concurring opinion by two of the Supreme Court Justices, in the *Hust* case, goes much further and construes the 'General Agency' contract as putting the agent in possession and control of the ship. Since that minority holding is not the holding of the court, we are not bound to follow it nor to decide whether, if it were the decision of the court, we should have to follow it, as being on a question of maritime law or because it is a construction of a contract to which the United States is a party (See *S. R. A.* v. *Minnesota*, 90 Law. Ed. Advance Opinions, 663, 666)."

"We find nothing in this record to prove possession or control of the ship of these defendants Eckert and so hold with the Appellate Division that whatever his other remedy might be against the United States or anyone else (see the Federal Suits in Admiralty Act, U. S. Code, Title 46, Section 472), the plaintiff has no cause of action against the defendants . . .

> We agree with the Appellate Division that *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575 is not authority for plaintiff's position here, since in the *Brady* case the vessel was being operated by the agent under a different form of agreement with the United States, which agreement required the agent to man and operate it.".

This Court in deciding the *Hust* case, stated in the majority and concurring opinion that the duty of keeping the ship in a good condition of repair rested upon the general agent, who is the respondent in this case. The New York Court of Appeals in the case at bar, stated that the general agent was under no duty to third persons to keep the ship's appliances in a good condition of repair. Mr. Justice Rutledge, writing the prevailing opinion, stated:

> "It (the agent) was responsible for keeping the ship in repair and for providing the seamens' supplies."

Mr. Justice Rutledge, in various portions of the prevailing opinion, on more than one occasion, held that the general agent was the operator of the vessel. Mr. Justice Rutledge stated:

> "If this made them technically and temporarily employees of the United States it did not sever altogether their relation to the operating agent."

In another portion of the opinion Mr. Justice Rutledge stated:

> "But it does not follow from the fact that Hust was technically the government employee, that he lost all remedies against the operating agent."

Mr. Justice Douglas writing the concurring opinion in the *Hust* case, with whom Mr. Justice Black agreed, stated on page 748:

> "The agreement moreover specifically provides that the Master is an agent and employee of the United States * * * From this it is argued that the members of the crew were employees of the United States, not of the General Agent or operator.
>
> If the parties to a contract could by the choice of a label determine these questions of responsibility to third persons the problem would be simple. But the conventions of the parties do not determine in the eyes of the law the rights of third persons. *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575."
>
> "This problem of liability to third persons is resolved by determining whose enterprise the particular venture was. The fact that the parties say it is the enterprise of one, not the other, is not the decisive. Control in the operation and management of the business, as distinguished from general supervision, is the customary test. I look in vain to find in the present arrangement any evidence that the owner acted as the manager of this business. Respondent, The General Agent, had a most substantial measure of control over the operation of the vessels. Its de facto control was no whit less or more whether the Master were called the agent of the owner or its own agent. The case is not one where an agent attends only to the business of a vessel as distinguished from its manning or physical operation or control. Respondent maintains the ves-

sels in the broadest sense and procures a Master and crew. In the *Brady* case the operation was 'to man, equip, victual, supply and operate the vessels.' 317 U. S. p. 576, 1943 A. M. C. 1. The same was true in *Quinn* v. *Southgate Nelson Corp.*, 1941 A.M.C. 1214, 121 F. (2d) 190, 191. But the difference in words between the agreements in those cases and the present one does not, on a view of the entire situation, mark a difference in functions of the private operator. It is, indeed, difficult to see how the functions of the private operator were in any way changed under this agreement from what they were in those other two cases. Respondent, of course, accounts for its operations to the United States. The United States reimburses it for all of its expenditures, including the wages of the crew. But it is immaterial that the owner provides the entire crew and pays their wages. A charterer who has control of the operations is owner *pro hac vice*. *Hills* v. *Leeds*, 149 Fed. 878. So far as this record reveals the operator performed all of the functions which it performed in the *Brady* and *Quinn* cases. There is here no taking over of additional functions by the owner. The arrangement is clothed in different garb. But it is the private operator who manages and controls the physical operation. The powers reserved to the owner were general supervisory powers adequate for the exigencies of the war time conditions which prevailed. But they did not detract from the powers of physical operation granted respondent."

On page 749, the Court stated:

"The fact that we have no more than an agency in form not in substance is borne out by

collateral phases of the undertaking. The compensation of respondent is not to be less than 'the account of earnings which the General Agent would have been permitted to earn under any applicable previously existing bareboat charters, preferences, agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination order permissible thereunder as of March 22, 1942.' Art. 5. The United States agrees to reimburse respondent for 'damages or compensation for death or personal injury or illness' required to be paid. Art. 7. It also agrees to reimburse respondent for payments made by respondent to a pension fund for officers and members of the crew, as well as for 'social security taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise." Id.

On page 750, the Court stated:

"These provisions all suggest, as the relationship of the parties bears out, that the United States was the underwriter or the financial risks of the venture, the operator continuing as it always had to perform the managerial functions. These managerial functions constitute control, decisive of liability in this case. There was no demise. But the form of the agreement is not important if the functions of the operator were those of an owner *pro hac vice*. I think that is the true condition which existed here."

"At common law respondent would be the principal, for the business of managing and operating the vessel was its business. It was therefore the

employer and responsible for this personal injury claim."

In the case of *Joseph Militano* v. *United States of America and States Marine Corporation*, decided by the United States Circuit Court of Appeals for the Second Circuit in New York, on July 9, 1946 and reported in 1946 A. M. C., page 1143, Judge Swan, speaking for the Court on page 1144 stated:

> "The appellant was a stevedore in the employ of the United States at the Army Base, Brooklyn, N. Y. On January 19, 1943 he was ordered aboard the S. S. 'Benjamin Hawkins' to operate a winch at hatch No. 5 in loading government-owned cargo. This vessel was a Liberty ship owned by the United States and managed by States Marine Corporation under a general agency contract with the War Shipping Administration; she lay at a pier at the Army Base. While performing his work as winchman the appellant suffered injuries to the fingers of his left hand by reason, as he claims, of defects in the wire cable running from the drum to the gin block. To recover damages for such injuries he filed a libel against the United States and a civil action in tort against States Marine Corporation. A jury trial having been waived in the latter action the two cases were tried together to the Court and resulted in a judgment of dismissal in each."

On page 1146 the Court stated:

> "Militano's injuries were caused by the fact that splinters or 'fish hooks', which had developed in some of the strands of the steel cable leading from the drum of the winc he was operating,

caught in his glove and drew his left hand into the gin block before he could stop the winch. Relying on the *Brady* case, *supra*, he urges that the defective condition of the cable renders liable States Marine as the operating agent of the vessel. The defendant replies that under its agreement with the War Shipping Administration it had no control over the vessel or its crew, was not charged with the duty to repair but merely with the duty to report the condition of the vessel to its principal, the United States, and, if the cable needed to be replaced, it devolved upon the crew to replace it, as spare cables were on board. It argues that the *Brady* case is inapplicable because of differences in the agency agreement there involved and the one under which it was acting. Those differences were pointed out in *Murray* v. *American Export Lines*, 53 F. Supp. 861 (S. D. N. Y.) where the same form of 'Service Agreement' (GAA 4-4-42) was used as in the case at bar. But such differences cannot be deemed material, we think, in view of *Hust* v. *Moore-McCormack Lines*, *supra*. There it was held that a seaman injured by the negligence of a fellow member of the crew could maintain an action under the Jones Act against an operating agent employed under the same form of service agreement as States Marine had, the majority opinion stating (page 17, pamphlet edition):

> 'The mere fact that the terms of the standard agreement were changed to omit the provision for manning the ship and substitute the provisions relating to employees contained in the General Service Agreement was not, in these circumstances enough to deprive seamen of that remedy.'" —

On page 1147, the Court stated:

> "The concurring opinion of Justices Douglas and Black (page 3, pamphlet edition) clearly state their view that the difference in words between the standard agreement of the *Brady* case and the service agreement of the *Hust* case does not 'mark a difference in functions of the private operator.' If the agent remains the employer sufficiently to be liable to member of the crew under the Jones Act, we think it cannot escape the duties of an owner *pro hac vice* in other respects. Thus it has the duty to furnish stevedores with a safe place to work, a duty which is analogous to that owned by a landowner to a business visitor. *Grillo* v. *Royal Norwegian Government*, 139 F. 2d 237, 238 (C. C. A. 2); see *Pioneer S. S. Co.* v. *McCann*, 170 Fd. 873, (C. C. A. 6); *Glover* v. *Compagnie Generale Transatlantique*, 103 F. 2d 557, 559 (C. C. A. 5), cert. den. 308 U. S. 550."

The New York Court of Appeals in the case at bar in affirming the Appellate Division's ruling that the general agent was not liable to third persons for any defect of the vessel, refused to follow the decision of this Court in the *Hust* case because it was claimed the *Hust* case involved the Jones Act. The case of *Militano* v. *U. S. A., et al.*, decided by the New York Federal Circuit Court of Appeals in New York in July, 1946, *supra*, had a state of facts similar to the facts in the case at bar. In the *Militano* case, a longshoreman was injured as in the case at bar. The Federal Circuit Court of Appeals, of New York, in commenting upon this situation, in its opinion at page 1147 stated:

> "If the agent remains the employer sufficiently

> to be liable to members of the crew under the Jones Act we think it cannot escape the duties of an owner *pro hac vice* in other respects. Thus it has the duty to furnish stevedores with a safe place to work, a duty which is analogous to that owed by a landowner to a business visitor."

In the case of *Brady* v. *Roosevelt Steamship Company*, 317 U. S. page 575, Mr. Justice Douglas, speaking for the Court at page 576 stated:

> "S. S. Unicci was a vessel owned by the United States Maritime Commission and operated for it by respondent under a contract covering this and other vessels. * * * The deceased was a United States customs inspector. While boarding the vesesl on his official duties in July, 1936 a rung of the ladder which he was climbing broke. The injuries which resulted caused his death. At the time of the injury the vessel was docked at a pier in New York City."

On page 580, the Court stated:

> "The liability of an agent for his own negligence has long been embedded in the law. *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190, is a recent application of that principle to a situation very close to the present one. But the principle is an ancient one and applies even to certain acts of public officers or public instrumentalities. As stated in *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, 258 U. S. 549, 567, 'An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts.'"

On page 583, the Court stated:

> "Moreover, if petitioner had a cause of action against respondent, it is difficult to see how she could be deprived of it by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law creates cannot be so readily obtained. (*cf. Guaranty Trust Co.* v. *Green Cove R. R. Co.*, 139 U. S. 137, 143.) The rights of principal and agent *inter se are not* the measure of the rights of third persons against either of them for their torts."

POINT II

The New York Court of Appeals was in error in holding that the agency agreement in the case of Brady v. Roosevelt Steamship Company, supra, decided by this Court differs with the agency agreement in the case at bar. It was likewise in error in deciding that the decision in the Brady case has no application to the facts in the case at bar.

The New York Court of Appeals in the case at bar, and which is reported in 295 N. Y. 463, stated on page 467 as follows:

> "We agree with the Appellate Division that *Brady* v. *Roosevelt Steamship Company*, 317 U. S. 575 is not authority for plaintiff's position here, since in the *Brady* case the vessel was being operated by the agent under a different form of agreement with the United States, which agreement required the agent to man and operate it."

This Court, both in the prevailing and concurring opinion held that the *Brady* decision was controlling in a matter involving the facts in the case at bar and that there was no substantial difference between the agency agreement in the *Brady* case and the one considered in the *Hust* case, which is identical with the agency agreement in the case at bar.

Mr. Justice Douglas, in writing the concurring opinion in the *Hust* case, with whom Mr. Justice Black agreed, stated on page 748 and 749:

> "In the *Brady* case the operator was to man, equip, victual, supply and operate the vessels. 317 U. S. page 576. The same was true in *Quinn* v. *Southgate Nelson Corp.*, 1941 A. M. C. page 1214. But the difference in words between the agreement in those cases and the present one does not, on a view of the entire situation, mark that difference in functions of a private operation. It is indeed difficult to see how the functions of the private operator were in any way changed under this agreement from what they were in those other two cases."

Mr. Justice Rutledge, writing for the majority opinion in the *Hust* case, mentioned the *Brady* decision several times. On page 732, he stated:

> "It is around these questions and the effect for determining them of various authorities, particularly *Brady* v. *Roosevelt*, 317 U. S. 575 that the controversy is revolved in the State Courts and here."

POINT III

The proof in the case at bar showing that the respondents operated and had possession and control of the vessel is stronger than in the cases decided by this Court in Hust v. Moore-McCormack Lines, Inc. and Brady v. Roosevelt Steamship Company, supra, and in the case of Militano v. U. S. A., et al, decided by the Federal Circuit Court of Appeals for the Second Circuit.

Some of the proof in the case at bar relating to operation and control was not offered in evidence in the *Hust*, *Brady* and *Militano* cases *supra*. In addition to the agency agreement marked Plaintiff's Exhibit 1, which appears at Record, folios 1009 to 1089 and the rules and regulations issued by the War Shipping Administration after the General Agency agreement, Exhibit 1, had been entered into, which is marked Plaintiff's Exhibit 8, R. folios 1072 to 1089, there was offered in evidence Defendant's Exhibit 6, which is a book containing photostatic copies of orders and regulations issued by the War Shipping Administration and which will be submitted to this Court, together with the petition. In the *Hust* and *Militano* cases, *supra*, this Court and the Circuit Court of Appeals for the Second Circuit correctly held that under the agency agreement, the general agent was in possession and control of the vessel and operated the same. In neither case was the book containing photostatic copies of orders and regulations issued by the War Shipping Administration and marked Defendant's Exhibit 6, offered in evidence. These orders and regulations strengthen the claim that the general agent was in possession and in control of the vessel and physically operated the same.

At the outset, counsel desires to state that not a single order, direction or request was ever made by the United States Government or the War Shipping Administration directly to any officer or member of the crew of any vessel operated under the general agency agreement. The general agent was in direct contact with the officers and crew, gave them their instructions and told them what to do.

Reading the general agency agreement and the rules and regulations issued by the War Shipping Administration to the respondents in the case at bar, the conclusion is irresistable that the respondents were the operators of the vessel and in possession and control of the same.

The Defendants and the War Shipping Administration Contemplated Operation of the Vessel by the Defendants

Plaintiff's Exhibit 1, folios 1009 to 1089 and the rules and regulations issued by the War Shipping Administration, after Plaintiff's Exhibit 1 had been entered into, which is marked Plaintiff's Exhibit 8, folios 1072 to 1089 and Defendants' Exhibit 6, a book containing photostatic copies of orders and regulations issued by W. S. A. and which will be submitted to this Court, must be read in their entirety to appreciate what the parties intended by the agency agreement and the rules and regulations mentioned.

In Article 16 of the agency agreement, folio 1048, it is provided:

> "The United States shall indemnify, and hold harmless and defend the General Agent against any and all claims and demands * * * for injury to persons or property *arising out of or in*

any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder." (Italics ours.)

On page 74 of the Defendants' Exhibit 6, the following notation appears:

"WAR SHIPPING ADMINISTRATION

New York, New York

December 4, 1943

To: General Agents under Service Agreements with the W. S. A.

Subject: Maintenance and Repair Regulations No. 3.

Maintenance and Repair Regulations No. 1, Revised—Supplement No. 1.

In connection with repairs on vessels operated by your Company for account of War Shipping Administration, we are enclosing herewith, for your information and guidance, one copy of Maintenance and Repair Regulations, No. 1, Revised ——" (Italics ours.)

It will be noted that both the War Shipping Administration and the defendants assumed that the vessel was operated by the defendants; otherwise the War Shipping Administration would not have stated:

"In connection with repairs on vessels operated by your company. * * *"

Under date of May 31, 1943, the War Shipping Ad-

ministration issued Regulations No. 59 which appears on page 33 as follows:

> "Therefore, General Agents of the War Shipping Administration are hereby instructed to include in the Marine Index Bureau *all vessels assigned and delivered for operation under General Agency Agreement, as of May* 1, 1943." (Italics ours.)

On page 36 of Defendants' Exhibit 6, Regulations No. 65, it is provided:

> "General Agents are directed that when carrying cargo, cargo oil other than fuel oil, or fresh water in the forward deep tanks of Liberty vessels, the dump valves are to be blanked off."

Under date of October 8, 1942, appearing in Directive No. 1 on page 28 of Defendants' Exhibit 6, the following appears:

"WAR SHIPPING ADMINISTRATION

Washington

October 8, 1942

DIRECTIVE No. 1

To All General Agents and Agents of Vessels Owned by or Chartered to the War Shipping Administration

A frequent and most serious criticism of the American merchant marine has been the lack of discipline aboard ship, both at sea and in foreign ports. The War Shipping Administration is alarm-

ed that these conditions continue in the face of the present war situation. Lack of discipline and order aboard ship is intolerable. It cannot be allowed to continue.

The deterioration of the authority of the Master and licensed officers is the principal cause for the breakdown in discipline. It is essential that this authority be restored immediately and maintained.

All Masters have been instructed to report serious breaches of discipline to the operating agent of the War Shipping Administration subsequent to the commitment of the violation." (Italics ours.)

It will be noted that in matters of discipline aboard vessels, the general agent's attention was called for action to be taken. The statement in the Directive:

'All masters have been instructed to report serious breaches of discipline to the operating agent of the War Shipping Administration * * *."

corroborates our claim that the general agent was the operator of the vessel.

The Defendants Were in Custody and Control of the Vessel.

The War Shipping Administration recognized the fact that under the general agency agreement and the regulations issued thereunder, the general agent was to be in custody and control of the vessel. At folio 1039, Article 12, provides:

"In case of termination of this agreement,

whether upon expiration of the stated period hereof or otherwise, *all vessels and other property of whatsoever kind then in the custody of the General Agent pursuant to this agreement, shall be immediately turned over to the United States.*" (Italics ours.)

At folio 1037, Article 11 (g) provides:

"The United States shall have the right to terminate this Agreement at any time as to any and all vessels assigned to the General Agent and to assume control forthwith of any and all said vessels upon fifteen (15) days' written or telegraphic notice."

Apparently both the United States and the defendants, as general agent, were of the opinion that the vessel under the agency agreement was under the control of the agent. Otherwise, the statement would not have been made in Article 11 that "The United States shall have the right to terminate this Agreement * * * and to assume control forthwith of * * * all said vessels."

The Defendants Employed the Ship's Officers and Crew

Under date of October 8, 1942, Directive No. 1 issued by the War Shipping Administration to general agent, and which appears on page 28 of the Defendants' Exhibit 6, the following is stated:

"You are instructed to place a copy of this communication, together with a copy of this letter, in the hands of all Masters and officers *in your employ.*" (Italics ours.)

Under date of June 22, 1942, the War Shipping Administration issued Operations Regulation No. 4, and which appears on page 67 of the Defendants' Exhibit 6 as follows:

> "Effective immediately, General Agents shall assign to each new vessel under construction and allocated to them by War Shipping Administration, a Master, Chief Mate, Chief Engineer and First Assistant Engineer, approximately thirty (30) days prior to the completion and delivery date."

We understand the word "assign" to mean "hire". This Operations Regulation No. 4 must be deemed to have modified the original agreement marked Plaintiff's Exhibit 1.

Article 1 of the Agency Agreement, folio 1010 provides:

> "The United States appoints the General Age ' • • • to manage and conduct the business of vessels assigned to it by the United States from time to time."

Article 2, folios 1011, provides:

> "*The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such directions, orders, or regulations.*" (Italics ours.)

Article 3 (a), folio 1012 provides:

> "Maintain the vessels in such trade or service as the United States may direct."

Article 3 (b), folio 1013 provides:

"Collect all moneys due to the United States under this Agreement and deposit, remit, or disburse the same."

Article 3 (c), folio 1013 provides:

"Equip, victual, supply and maintain the vessels."

Article 3 (d), folio 1014 provides:

"The General Agent shall procure the Master of the vessels, operated hereunder, subject to the approval of the United States. * * * The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel."

Article 3 (e), folio 1016 provides:

"Issue or cause to be issued to shippers customary freight contracts and Bills of Lading."

Article 4 (a) [illegible]s 1023 and 1024 provides:

"The General Agent * * * shall keep its books, records and accounts relating to the management, operation, conduct of the business and maintenance of the vessels covered by this Agreement in such form and under such regulations as may be prescribed by the United States."

Article 7, folios 1030 and 1031 provides:

"The United States shall reimburse the Gen-

eral Agent at stated intervals determined by the United States for all expenditures * * * *and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder* * *. To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures, in connection with the vessels hereunder, including, without limitation, all disbursements for or on account of wages, extra compensation, overtime, * * * damages or compensation for death, or personal injury or illness, and insurance premiums, required to be paid by law." (Italics ours.)

Article 14 relates to maintenance, inspections and repairs and is the most important article in the agreement. It appears at folios 1045 and 1046 and provides as follows:

"The General Agent shall, unless otherwise instructed, subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States, arrange for the repair of the vessels, covering, hull, machinery, boilers, tackle, apparel, furniture, equipment and spare parts, and including maintenance and voyage repairs and replacements, for the account of the United States, as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition. The General Agent shall exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels, and so advise the United States from time to time, in order that the United States may satis-

> fy itself that the vessels are being properly maintained, and shall cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable."

Plaintiff's Exhibit 8 (fols. 1075 to 1089) is a supplement to Plaintiff's Exhibit 1 (fols. 1009 to 1059) and shows that the agent had a substantial measure of control over the vessel. Section 2, subdivision (f) folio 1083 provides:

> "(f) Supervise to completion, irrespective of the amount to be expended, all maintenance and insurance repairs including the requirements of the Classification Social and Bureau of Marine Inspection and Navigation, and approved changes and improvements."

Under date of June 1, 1943, the War Shipping Administration issued Operations Regulation No. 48, which will be found on page 12 of the Defendants' Exhibit 6, which reads as follows:

> "Effective immediately, General Agents are directed to instruct Masters that stores, supplies and equipment are to be ordered through the vessels' port agents."

Under date of January 2, 1943, the War Shipping Administration issued Operations Regulation No. 30, which will be found on page 13 of the Defendants' Exhibit 6, which reads as follows:

> "General Agents . . . are instructed to notify the Masters of such vessels to bolt down securely deep tank covers even when the deep tanks are used for carrying dry cargo."

Under date of February 16, 1943, the War Shipping Administration issued Operations Regulation No. 42, which will be found on page 15 of the Defendants' Exhibit 6, which provides:

> "In the interest of safety of the ships' personnel and the morale of crews, Agents and General Agents of the War Shipping Administration vessels are, therefore, directed to instruct the Master and Chief Engineer aboard each vessel to ascertain prior to the proceeding to sea, the condition of the floor plates in the engine and fire rooms of their vessels."

Under date of February 16, 1943, the War Shipping Administration issued Operations Regulation No. 43, which will be found on page 16 of the Defendants' Exhibit, which provides:

> "Agents and General Agents of the War Shipping Administration are directed to instruct Masters that wherever practicable water shall be utilized for ballast purposes in lieu of fuel oil."

Under date of March 10, 1943, the War Shipping Administration issued Operations Regulation No. 50, which will be found on page 18 of the Defendants' Exhibit 6, which reads as follows:

> "All agents and general agents are therefore directed to caution masters and crews of vessels calling at ports in foreign countries to discontinue payments in Dollar currency, etc."

Under date of November 2, 1943, the War Shipping

Administration issued Operations Regulation No. 75, which will be found on page 37 of the Defendants' Exhibit 6, which reads as follows:

> "General Agents are directed to issue the following instructions to Masters of vesesls owned by and under bareboat charter to the War Shipping Administration."

Under date of December 4, 1943, the War Shipping Administration issued Operations Regulation No. 81, which will be found on page 50 of the Defendants' Exhibit 6, which provides:

> "Agents and general agents of the War Shipping Administration are directed to instruct masters to inform Armed Guard Officers as to the time and place of convoy conferences in sufficient time to accompany the Masters to the conferences."

Under date of December 11, 1943, the War Shipping Administration issued Operations Regulation No. 83, which will be found on page 53 of the Defendants' Exhibit 6, which provides:

> "Agents and general agents of the War Shipping Administration are hereby directed to instruct ships' personnel of the following practice to be observed in establishing quantities of Bunker Fuel Oil acquired or discharged."

CONCLUSION

It is respectfully submitted that the writ of certiorari prayed for should be granted to the end that this action may be reviewed and determined by this Court; and the order of the New York Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper.

PETER CALDAROLA,

By ABRAHAM M. FISCH,
ISIDOR ENSELMAN,
SIDNEY SCHIFFMAN,
Counsel for Petitioner.

Dated: New York, New York,
October 10, 1946.